



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 22-01661
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Charles S. Elbert, Esq.

07/28/2023

Decision

HARVEY, Mark, Administrative Judge:

Guideline H (drug involvement and substance misuse) security concerns are not mitigated at this time. Eligibility for access to classified information is denied.

Statement of the Case

On February 11, 2022, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On November 7, 2022, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline H. (HE 2) On March 21, 2023, Department Counsel was ready to proceed.

On March 27, 2023, the case was assigned to me. On April 4, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 17, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered three exhibits into evidence; Applicant offered 12 exhibits into evidence; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 11, 19-23; GE 1-GE 3; Applicant Exhibit (AE) A-AE L) On May 1, 2023, DOHA received a transcript of the hearing. The record was not held open after the hearing for additional exhibits. (Tr. 61)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, she admitted the SOR allegations in ¶ 1.a, and she denied the SOR allegations in ¶ 1.b. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 44-year-old senior manager. (Tr. 26) She has been employed since 2001 working for two DOD contractors. (Tr. 23-25) She received four promotions from her first DOD employer. (Tr. 26) She has been married for 17 years, and she has one seven-year-old child. (Tr. 24) She has not served in the military. (Tr. 54) In 1997, she graduated from high school. (Tr. 54) In 2001, she received a bachelor's degree in computer information systems. (Tr. 24, 54) She was awarded master's degrees in business administration and information management. (Tr. 25) Her resume provides additional information about her employment history and background. (Tr. 25-26; GE 1; AE A)

Drug Involvement and Substance Misuse

SOR ¶ 1.a alleges Applicant used marijuana and took gummies enhanced with tetrahydrocannabinol (THC) with varying frequency from about August 1999 to about July 2021. SOR ¶ 1.b alleges she used marijuana and took gummies enhanced with THC with varying frequency from about September 2012 to about July 2021, after being granted access to classified information.

In Applicant's February 11, 2022 SCA, she said "I used marijuana a few times over the last seven years in a recreational setting. I have smoked marijuana a few times and taken gummies enhanced with THC. I would estimate use at 10 or less times in the last 7 years." (GE 1 at 29) In her March 31, 2022 Office of Personnel Management (OPM) personal subject interview (PSI) she said:

[She] admits that she did not think about her security clearance the few times that she used marijuana. She didn't actively use her clearance at [that] time and did not think about it. [She] has no future intent to use marijuana. She understands that using marijuana while possessing a security clearance is not allowed and could result in termination. (GE 2)

In 1999, Applicant used marijuana while she was in college. (Tr. 42-43) She stopped using marijuana before she was hired by a DOD contractor in 2001. (Tr. 43) She was tested for illegal drug use before she was hired. (Tr. 44) The DOD contractor's policy was employees were not allowed to be under the influence of alcohol or drugs at work. (Tr. 43) She was never drug tested after the DOD contractor employed her. (Tr. 44) She did not use illegal drugs from 2001 to 2012. (Tr. 45)

In 2012, Applicant applied for a security clearance because her employer believed she might need it in the future. (Tr. 31) She said she did not use marijuana in the previous seven years on her 2012 SCA. (Tr. 34) In 2012, she did not have access to classified information. (Tr. 31) About two months after her security clearance was approved, she was transferred to a different state, and she did not need a security clearance. (Tr. 32) She never used marijuana while having access to classified information. (Tr. 32) She understood that she was not permitted to use marijuana while she had a security clearance. (Tr. 34) She used marijuana a few times from 2012 to 2014, which was after she completed her 2012 SCA. (Tr. 45) Although she did not have access to classified information, she used marijuana after her security clearance was granted. (Tr. 46) She did not believe her employment while working for the DOD contractor was "sensitive" employment. (Tr. 52-53) Her annual pay in 2020 was about \$135,000, and she supervised employees working on some important DOD contracts involving weapons systems. (Tr. 53) As to whether her employment is sensitive, she said it depends on how the term "sensitive" is defined. (Tr. 54)

Applicant used marijuana two or three times between 2015 and July 2021. (Tr. 34, 38, 51) However, later she said she did not use marijuana from January 2014 through October 2017. (Tr. 49; GE 1) She ended her association with the people with whom she used marijuana, except for her husband who continues to use marijuana. (Tr. 35-37) She has used marijuana with him in the past. (Tr. 50) He does not use marijuana in her home or in her presence. (Tr. 37-38) She did not advise her facility security officer of her marijuana use because she was not accessing classified information. (Tr. 48)

Applicant stopped using marijuana in July 2021 because she was looking for new employment, her daughter was getting older, and she had made some other life-style changes. (Tr. 38) She has not received any medical treatment for abuse of illegal drugs. (Tr. 39; AE I) Her primary-care physician indicates she has not been prescribed any controlled substances; she has not received any inpatient mental-health treatment; and she has been of "sound mental health." (Tr. 39; AE H)

Applicant regrets her marijuana use, and she does not intend to use marijuana in the future. (Tr. 40; AE I) She acknowledged her marijuana use was wrong, and she apologized for her marijuana use. (Tr. 42) She provided a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for or would result in revocation of national security eligibility. (AE I) See AG ¶ 26(b)(3), *infra*. She offered to voluntarily submit to random urinalysis testing for detection of abuse of illegal drugs. (Tr. 40-41) On April 24, 2023, she tested negative in a urinalysis-drug test for the presence of illegal drugs in her body. (Tr. 41; AE J)

Character Evidence

Applicant received excellent performance evaluations, which included “exceeded expectations” in the areas of integrity and trust. (Tr. 27-30; AE B-AE F) Her ratings were all “exceeded,” “impactful,” or “exceptional.” (AE B-AE F) Her employers since 2001 have never disciplined her. (Tr. 27; AE I) A director where Applicant is currently employed described her as an exceptional leader who is extremely talented, loyal, ethical, diligent, and trustworthy. (Tr. 41; AE J)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of

establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 provides the security concern arising from drug involvement and substance misuse stating:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition);” “(c) illegal possession of a controlled substance. . . .”; and “(f) any illegal drug use while granted access to classified information or holding a sensitive position.” AG ¶ 25(f) is not established because she did not actually have access to classified information, and there is insufficient evidence that she held a “sensitive position.” The record establishes AG ¶¶ 25(a) and 25(c). Additional discussion is in the mitigating section, *infra*.

AG ¶ 26 lists four conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

Possession of a Schedule I controlled substance is a federal criminal offense. Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications as follows:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.

Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (Dec. 21, 2021) at 2 (quoted in ISCR Case No. 20-02974 at 3-4 (App. Bd. Feb. 1, 2022)); AE L.

Applicant possessed and used marijuana 10 or less times while working for a DOD contractor. Her decision to repeatedly possess and use marijuana after being granted a security clearance is an indication that she may lack the qualities expected of those with access to national secrets.

Applicant provided some important mitigating information. She voluntarily disclosed her marijuana possession and use during the security clearance process. She disclosed her marijuana use on her SCA, to an OPM investigator, in her SOR response, and during her hearing. She provided a signed statement of intent to abstain from all drug involvement and substance misuse, and she acknowledged that any future involvement or misuse is grounds for revocation of national security eligibility.

At her hearing, Applicant said she ended her marijuana use in July 2021, and she did not intend to use marijuana in the future. Her husband continues to use marijuana although he does not use marijuana in her presence or in her home. I am not convinced her marijuana possession and use “happened under such circumstances that it is unlikely to recur [and] does not cast doubt on [her] current reliability, trustworthiness, [and] good judgment.” I am uncertain about her future marijuana use. More time without marijuana use is necessary to establish her future abstinence from marijuana possession and use. Guideline H security concerns are not mitigated at this time.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 44-year-old senior manager. She has been employed since 2001 working for two DOD contractors. She received four promotions from her first DOD employer. In 2001, she received a bachelor's degree in computer information systems. She was awarded master's degrees in business administration and information management. Her resume provides additional information about her employment history and background.

Applicant received excellent performance evaluations, which included "exceeded expectations" in the areas of integrity and trust. Her ratings were all "exceeded," "impactful," or "exceptional." (AE B-AE F) Her employers since 2001 have never disciplined her. A director where Applicant is currently employed described her as an exceptional leader who is extremely talented, loyal, ethical, diligent, and trustworthy.

Applicant discussed his history of involvement with marijuana on her SCA, during her OPM personal subject interview, in her SOR response, and at her hearing. She did not test positive on a urinalysis test, and she does not have any drug-related arrests. She promised not to use marijuana in the future.

The evidence against grant of a security clearance is more persuasive at this time. Applicant said she used marijuana 10 or less times after receiving a security clearance in 2012; however, she did not actually have access to classified information. Her most recent marijuana use was in July 2021, which was 22 months before her security clearance hearing in May 2023. She resides with her husband, who is a current marijuana user. There is no "bright line" test on how long a person must abstain from marijuana possession and use to receive access to classified information.

An honest and candid self-report of marijuana use is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation. Applicant receives full credit for her candid and honest self-report of her marijuana possession and use during the security clearance process.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With continued abstention from illegal drug possession and use, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate drug involvement and substance misuse security concerns.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge